IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 26, 2006 Session

MARK LUNSFORD v. MONTGOMERY COUNTY, TENNESSEE

Appeal from the Circuit Court for Montgomery County
No. 50100105 Michael R. Jones, Judge

No. M2005-00257-COA-R3-CV - Filed on April 4, 2007

This appeal involves a retaliatory discharge claim pursuant to 42 U.S.C. § 1983. The Plaintiff's complaint alleges that the Montgomery County Sheriff's Department terminated him for exercising his first amendment rights by filing a complaint against John Zimmerman, District Attorney General Pro Tem, several detectives, the Clarksville Police Department and the Montgomery County Sheriff's Department, alleging "gross negligence and deliberate indifference" during the criminal investigation of the Plaintiff's stepson's death. The trial court granted the Defendant's Motion for Summary Judgment. On appeal, the Plaintiff claims that the complaint addressed a matter of public concern, his rights as a citizen outweigh the Defendant's rights as an employer, and the issue of whether the Defendant terminated the Plaintiff because of the complaint is a question of fact that a jury must decide. We conclude that the complaint addressed a matter of public concern, that the Plaintiff's rights as a citizen to address a matter of public concern outweigh the Defendant's rights as an employer and that a genuine issue of material fact exists as to whether the Plaintiff's complaint was a substantial and motivating factor in the Defendant's decision to terminate the Plaintiff and whether the Defendant would have terminated the Plaintiff even in the absence of the protected speech. Therefore, we reverse and remand the case to the trial court for trial before a jury.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed.

JERRY SCOTT, SR. J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Peter T. Skeie, Nashville, Tennessee, for the appellant, Mark Lunsford.

Neil M. McIntire, Nashville, Tennessee, for the appellee, Montgomery County, Tennessee.

OPINION

I. Facts and Background

The Plaintiff was employed by the Montgomery County Sheriff's Department as a jailer. In 1993, his stepson died, and an investigation by the Clarksville Police Department concluded that the death was accidental due to a self induced drug overdose. Dissatisfied with the investigation by the Clarksville Police Department, the Plaintiff asked the Montgomery County Sheriff's Department to investigate. The Montgomery County Sheriff's Department also concluded that the death was accidental.

After both departments concluded that the death was accidental, the Plaintiff continued his own investigation into his stepson's death, and then in 1998, the Plaintiff asked the new Clarksville Chief of Police to convene a coroner's inquest. The finding reached at the coroner's inquest contradicted the conclusions resulting from the prior investigations of the Clarksville Police Department and Montgomery County Sheriff's Department and found that the Plaintiff's stepson was the victim of a homicide.

On March 15, 2000, the Plaintiff, Mark Lunsford, filed a complaint against John Zimmerman, District Attorney General Pro Tem, several detectives, the Clarksville Police Department and the Montgomery County Sheriff's Department, alleging "gross negligence and deliberate indifference" during the criminal investigation of the Plaintiff's stepson's death in 1993. After filing the complaint, the Plaintiff had the next five days off from work and did not return to work until Monday, March 20, 2000, at 11:00 p.m. He was terminated by the Montgomery County Sheriff's Department sometime after his shift ended at 7:00 a.m. on March 21, 2000, the sixth day after he filed the complaint.

As previously noted, the Plaintiff had worked as a jailer for the Montgomery County Sheriff's Department since 1988. He had earned the rank of sergeant. As a sergeant, he supervised shifts at the Montgomery County Jail.

After being terminated, the Plaintiff filed a complaint claiming his discharge was against public policy pursuant to 42 U.S.C. § 1983 because the Montgomery County Sheriff's Department discharged him in retaliation for exercising his First Amendment rights by filing the complaint. The Defendant filed a Motion for Summary Judgment claiming that the Plaintiff does not have a claim because his speech was not protected and that no genuine issue of material fact existed because the Defendant terminated the Plaintiff for reasons other than filing the complaint including an allegation of favoritism, improper management of an inferior officer who lost his handgun, and failure to follow the proper procedure for trash duty.

The trial court granted the Defendant's Motion for Summary Judgment finding that (1) the subject of the speech was not a matter of public concern, (2) the Defendant's interest in fostering instinctive obedience, unity, commitment, and esprit de corps among its employees outweighed the Plaintiff's interest in expressing himself through his complaint and (3) the

Defendant did not discharge the Plaintiff for filing the complaint but rather discharged him for improper conduct that occurred prior to the Plaintiff filing the complaint.

On appeal, the Plaintiff claims that the complaint addressed a matter of public concern, his rights as a citizen outweigh the Defendant's rights as an employer, and whether the Defendant terminated the Plaintiff because of the complaint is a question of fact that a jury should decide.

II. Standard of Review

"Summary judgments enable courts to conclude cases that can and should be resolved on dispositive legal issues." Church v. Perales, 39 S.W.3d 149, 156 (Tenn.Ct.App.2000). Summary judgment is appropriate "when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Byrd v. Hall, 847 S.W.2d 208, 214 (Tenn.1993). Appellate review of a trial court's grant of summary judgment presents a question of law, which the appellate courts review de novo affording no presumption of correctness to the trial court's decision. Mooney v. Sneed, 30 S.W.3d 304, 306 (Tenn.2000). The evidence must be viewed in the light most favorable to the nonmoving party, drawing all reasonable inferences in the nonmoving party's favor. Edwards v. Hallsdale-Powell Utility Dist., 115 S.W.3d 461, 464 (Tenn. 2003).

III.Analysis

To establish a prima facia case of retaliatory discharge under 42 U.S.C. § 1983, the Plaintiff must "as a threshold matter, demonstrate that h[is] speech involved a matter of public concern which has been characterized as those matters as to which 'free and open debate is vital to informed decision-making [by the] electorate.'" Phillips v. State Bd. of Regents, 863 S.W.2d 45, 51 (Tenn.1993), quoting Pickering v. Bd. of Educ., 391 U.S. 563, 571-72 (1968). After the Plaintiff demonstrates that the speech involved a matter of public concern, the Court must balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [governmental entity], as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Bd. of Educ., 391 U.S. at 568. If the speech is a matter of public concern and the interests of the employee, as a citizen, outweigh the interests of the employer, then the Plaintiff must demonstrate that his complaint was a "substantial" or "motivating" factor in the Defendant's decision to terminate him. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). Once the Plaintiff establishes a prima facia case for retaliatory discharge under 42 U.S.C. § 1983, the burden falls on the Defendant to raise and prove, as an affirmative defense, that the Defendant would have terminated the Plaintiff "even in the absence of the protected conduct." Id. Therefore, to defeat summary judgment in this case, the Plaintiff must demonstrate that the complaint addressed a matter of public concern. The Court must balance the interest of the Plaintiff, as a citizen, in commenting on matters of public concern and the interest of the Defendant, as an employer, in promoting the efficiency of the public services it performs, and the Court must then determine whether a genuine issue of material fact exists as to whether the

complaint was a substantial or motivating factor in the Defendant's decision to terminate the Plaintiff and whether the Defendant would have terminated the Plaintiff even in absence of the complaint.

A.Whether the Plaintiff's complaint addressed a matter of public concern.

It is well settled by the United States Supreme Court that a governmental agency "cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." Connick v. Myers, 461 U.S. 138, 142 (1983). To establish a case for retaliatory discharge for his speech under 42 U.S.C. § 1983, the Plaintiff must first demonstrate that his speech involved a matter of public concern, i.e., "those matters as to which 'free and open debate is vital to informed decision-making [by the] electorate.'" Phillips v. State Bd. of Regents, 863 S.W.2d at 51. Speech addresses a matter of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," which "must be determined by the content, form and context of a given statement, as revealed by the whole record." Connick, 461 U.S. at 146, 147-48.

In Connick, the employee, an Assistant District Attorney, distributed a "questionnaire soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." Id. at 141. The Supreme Court of the United States held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." Id. at 147. The Court found that all the questions, except the one concerning whether employees felt pressured to work in political campaigns, did not address matters of public concern. The Court stated:

> [W]e do not believe these questions are of public import in evaluating the performance of the District Attorney as an elected official. [The employee] did not seek to inform the public that the District Attorney's office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did [the employee] seek to bring to light actual or potential wrongdoing or breach of public trust on the part of [her employer] and others.

Id. at 148. The Court held that the question regarding whether employees felt pressured to work in political campaigns addressed a matter of public concern, but found that the employee's interests did not outweigh the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. Id. at 154.

In the recent case of Garcetti v. Ceballos, __ U.S. __, 126 S.Ct. 1951, 1962 (2006), a Los Angeles County Deputy District Attorney General agreed with a defense attorney that the affidavit used to obtain a search warrant that was critical to a prosecution contained "serious misrepresentations." He spoke with the deputy sheriff who wrote the affidavit but failed to "receive a satisfactory explanation for the perceived inaccuracies." He relayed his findings to his supervisors and followed up by preparing a memorandum explaining his concerns and recommending dismissal of the prosecution. A few days later, he prepared another memo to a supervisor describing a second telephone conversation with the warrant affiant. Based on the memos, a meeting was held to discuss the affidavit. Attendees included the writer of the affidavit, the writer of the memos, two of his supervisors, and employees of the sheriff's office. The meeting allegedly became heated, with one (Sheriff's) lieutenant sharply criticizing (the deputy district attorney) for his handling of the case."

Despite the concerns expressed by the deputy district attorney general, his supervisor decided to proceed with the Prosecutor. At a hearing on a defense motion to traverse (the equivalent to a motion to suppress in Tennessee criminal practice), the writer of the memos was called as a defense witness and recounted his observations about the affidavit. The trial judge rejected the challenge to the warrant.

The deputy district attorney claimed in his suit that he was thereafter subjected to a series of retaliatory employment actions, including reassignment to another position, transfer to another courthouse, and denial of a promotion. Id. at 1955-56.

The District Court granted summary judgment, the Court of Appeals for the Ninth Circuit reversed the District Court and the United States Supreme Court reversed the Court of Appeals. Id. at 1956, 1962. In the opinion of the United States Supreme Court, the controlling factor in that case was that "his expressions were made pursuant to his duties as a calendar deputy," "fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case." Thus, the Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Id. at 1960.

The Court went on to note that public employees "who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government." Id. at 1961.

This case is factually different from Connick and Garcitti. In this case, the speech was in the form of a complaint rather than an interoffice questionnaire or memorandum. The content of the complaint alleges that the District Attorney Pro Tem, several detectives, the Clarksville Police Department and the Montgomery County Sheriff's Department were grossly negligent and deliberately indifferent during the criminal investigation of the Plaintiff's stepson's death. Unlike the questionnaire in Connick, the content of the complaint directly addressed whether the District Attorney Pro Tem, the Police Chief, and the Sheriff were properly discharging their

duties. Also, the Plaintiff filed his complaint as a private citizen and not as an employee of Montgomery County.

Additionally, unlike Connick and Garcitti, the Plaintiff in this case sought to inform the public that public officials and public agencies were, in his opinion, failing to properly discharge their governmental responsibilities in the investigation and prosecution of what appeared to be a murder, the most serious crime. The Plaintiff's complaint is of public import in evaluating the performance of the District Attorney Pro Tem as a public official, and the Clarksville Police Department and the Montgomery County Sheriff's Department as governmental agencies. The complaint is also of public import in evaluating the performance of the Chief of Police and the Sheriff, as appointed and elected officials, because the performance of the employees of their respective departments, particularly the detectives, directly relate to their performance of their duties as the department heads.

Furthermore, speech criticizing the performance of public officials and state agencies is important for free and open debate among citizens to promote informed decision-making when electing and appointing officials such as the Police Chief and the Sheriff. Moreover, whether the District Attorney Pro Tem, the Clarksville Police Department and the Montgomery County Sheriff's Department are properly investigating and prosecuting crimes are, without question, matters relating to society and are matters of concern to the community. If crimes are not properly investigated and prosecuted, the safety of the citizens within the community will surely be in jeopardy. As the United States Supreme Court has noted, "(e)xposing governmental inefficiency and misconduct is a matter of considerable significance." Garcetti, 126 S.Ct. at 1962. Therefore, based on the United States Supreme Court's holdings in the cited cases and the content, form and context of the complaint, as revealed by the whole record, we hold that the Plaintiff's complaint clearly addressed a matter of public concern.

B. Whether the Plaintiff's interests, as a citizen, in commenting upon matters of public concern outweigh the Defendant's interests, as an employer, in promoting the efficiency of the public services it performs.

Because the complaint addresses a matter of public concern, the Court must balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [governmental entity], as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Bd. of Educ., 391 U.S. at 568. This balancing test is also known as the "Pickering balance" or "Pickering test."

In evaluating the Plaintiff's interests as a citizen, the record reveals that the Plaintiff was the stepfather of the deceased. While he was employed as a "jailer," he filed a complaint as a private citizen during his time off, without any reference to his job. As previously noted, the complaint alleged that the District Attorney Pro Tem, several detectives, the Clarksville Police Department and the Montgomery County Sheriff's Department were grossly negligent and deliberately indifferent during the investigation of the Plaintiff's stepson's death. Also, the

Plaintiff's complaint addresses a matter of concern. The complaint is of public import in evaluating the performance of public officials and governmental agencies in order for the public to make informed decisions when electing and appointing public officials. Also, the complaint suggests problems with the local government that may jeopardize public safety.

In evaluating the Defendant's interest as an employer, the reasonably potential effects of the speech on the Defendant's operations must be considered because there was no proof of any facts pertaining to whether the complaint affected the operations of the employer because the Plaintiff was terminated just six days after filing the complaint. Before being terminated, the Plaintiff had been a jailer for twelve years working for the Montgomery County Sheriff's Department where he had attained the rank of sergeant. As a jailer, he did not investigate cases nor did he arrest anyone. His responsibilities were to supervise jail employees and to insure that the jail was running according to required procedures.

The United States Supreme Court has stated that "[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment" and that "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." Goldman v. Weinberger, 475 U.S. 503, 507 (1986). Based on Goldman, the Sixth Circuit stated that paramilitary organizations such as police departments are similar to the military in regulating their employees' uniforms. Thomas v. Whalen, 51 F.3d 1285, 1291 (6th Cir. 1995).

In Thomas, a police officer spoke to the media at a National Rifle Association function wearing his police badge on his suit pocket and was introduced as "a member of the Cincinnati police force." Id. at 1287. Later, the police officer filed a complaint against the police department alleging that "[his supervisors] had interfered with, attempted to chill, and penalized him for exercising his First Amendment rights. [The officer] specifically alleged that his transfer, the memo regarding his published articles, the questioning regarding one of those articles, the disciplinary charges associated with the affidavit, [a supervisor's] directive regarding [the officer's] future activities, [a supervisor's] unfavorable comments in his review, the parking ticket, and an incident with the SWAT team constituted deliberate harassment by [his supervisors] because of his opposition to gun control laws." Id. at 1288-89. The court held that the Pickering test weighed in favor of the government. The court based its holding on the following facts: the police officer's "career [had] not been set back, his salary remaine[d] the same, . . . he continue[d] his First Amendment activities", and the supervisors did "nothing to interfere with [the police officer's] ability to communicate his pro-gun message; their actions were designed simply to dissociate the Cincinnati Police Division from that message." Id. at 1292.

It is obvious that this case is factually different from Thomas. In this case, the Plaintiff filed a complaint as a private citizen and made no reference to his job. Also, the Plaintiff is a jailer and not a law enforcement officer. A major difference between this case and Thomas is that the Plaintiff, in this case, was terminated from his job, not transferred or given an unfavorable rating. Furthermore, the police officer in Thomas used his position with the police

department to promote his speech, which directly affected the operations of the police department by associating the police department with the police officer's speech. The Plaintiff, in this case, did not use his position as a jailer to promote his speech. Stated succinctly, he filed the complaint as a private citizen. Because the Plaintiff filed the complaint as a private citizen and the Plaintiff was not a law enforcement officer, but was a jailer whose sole job was to supervise and insure the jail was running according to required procedures, the facts suggest that the potential effects of the complaint on the Defendant's operations, if any, would have been minimal.

Therefore, because the Plaintiff filed the complaint as a private citizen, the complaint addresses a matter that suggests problems within the local government that may jeopardize public safety, and the potential effects of the complaint on the Defendant's operations would be minimal, we conclude that the Plaintiff's interest as a citizen commenting on matters of public concern outweighs the Defendant's interest as an employer in promoting the efficiency of the public services it performs through its employees. Stated more concisely, we conclude that the Pickering test weighs in favor of the Plaintiff.

C. Whether a genuine issue of material fact exists as to whether the Plaintiff's speech was a substantial or motivating factor in the Defendant's decision to terminate the Plaintiff and whether the Defendant would have terminated the Plaintiff even in absence of the complaint.

After the Plaintiff demonstrates that the speech addresses a matter of public concern and the Court determines that the Pickering test weighs in favor of the Plaintiff, the Court must determine whether a genuine issue of material fact exists as to whether the Plaintiff's speech was a "substantial" or "motivating" factor in the Defendant's decision to terminate the Plaintiff, and if so, whether the Defendant would have terminated the Plaintiff "even in absence of the protected conduct." Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. at 287.

In formulating this rule of causation, the Supreme Court stated that: the rule "protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights." Id. at 287. The Supreme Court further stated that:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision even if the same decision would have been reached had the incident not occurred.

Id. at 285. Stated differently, an employee should not be able to invoke the protection of the First Amendment just because the protected speech made the employer more certain of its decision.

When deciding whether a genuine issue of material fact exists as to whether the Plaintiff's complaint was a substantial or motivating factor in the Defendant's decision to terminate the Plaintiff and whether the Defendant would have terminated the Plaintiff even in the absence of the complaint, the "temporal proximity" of the termination to the protected speech is a factor as well as any other facts that are relevant to proving the employer's motive in terminating the employee, such as the employee's disciplinary history. Taylor v. Keith, 338 F.3d 639, 646-47 (6th Cir.2003), accord Nethersole v. Bulger, 287 F.3d 15, 18 (1st Cir.2002); Gorman-Bakos v. Cornell Coop. Extension of Schenectady County, 252 F.3d 545, 554-55 (2d Cir.2001); Hudson v. Norris, 227 F.3d 1047, 1051 (8th Cir.2000); Allen v. Iranon, 283 F.3d 1070, 1078 (9th Cir.2002).

In this case, the Plaintiff filed the complaint on Wednesday, March 15, 2000. After filing the complaint, the Plaintiff had the next five days off from work and did not return to work until Monday, March 20, 2000, at 11:00 p.m. He was terminated on March 21, 2000 sometime after his shift ended at 7:00 a.m., just six days after he filed the complaint. As for the Plaintiff's disciplinary record, the Plaintiff had at least three incidents. The first incident occurred at the end of 1998, over a year before his termination, when the Plaintiff was suspended for three days for how he dealt with an inferior officer who lost his gun. The second incident occurred prior to November 1999 when the Plaintiff was "chewed out" for not having enough deputies to supervise the inmate trash detail. The third incident occurred in December 1999 when the Plaintiff was verbally reprimanded for his unauthorized use of a departmental phone line.

Also, in mid-November 1999, the Plaintiff was one of four subjects of an internal departmental investigation into charges of favoritism. Specifically, there were allegations that the Plaintiff showed favoritism toward an inmate and allowed pizza to be brought in for the inmates. While being deposed, the Sheriff stated that:

> A. There was several allegations over a course of time. Specifically, the - - the one about the favoritism to the inmate, I think it was pretty well substantiated. I did disciplinary on it.
>
> About the same time, the allegation was made that he was allowing food to be brought in that - - I think some pizzas were sent down there by this inmate that he accepted into the jail on two or three occasions.
>
> Q. So you didn't fire him after you - - after you determined that he was allowing pizza to go into the jail?
>
> A. I didn't never determine for sure that he did. It was an allegation, and it was still somewhat vague as to who sent them.

Finally, on February 14, 2000, the Plaintiff wrote a grievance letter in accord with departmental policy complaining about being reassigned to the third shift.

In summary, the "temporal proximity" of the Plaintiff filing the complaint and his termination was six days. The Plaintiff's suspension was over a year prior to his termination. In the year preceding his termination, the Sheriff verbally reprimanded the Plaintiff twice, once for improper use of a departmental phone line and once for not having enough deputies to supervise the trash detail. Also, the Sheriff "did disciplinary on" the Plaintiff for showing favoritism to an inmate, instead of terminating him, but the Sheriff said he was unable to determine who allowed pizza in the jail for the inmates.[1] Finally, the Plaintiff followed departmental policy when he filed the grievance letter. Based on these facts, specifically the "temporal proximity" and the fact that the Defendant has had earlier opportunities to terminate the Plaintiff, but chose to wait until just six days after the complaint was filed, we conclude that a genuine issue of material fact exists as to whether the Plaintiff's complaint was a substantial or motivating factor in the Defendant's decision to terminate the Plaintiff and whether the Defendant would have terminated the Plaintiff even in the absence of the protected speech.

IV.Conclusion

For the reasons stated above, we hold that the complaint filed by the Plaintiff addressed a matter of public concern, and that the Plaintiff's interest as a citizen commenting on matters of public concern outweigh the Defendant's interest as an employer. Genuine issues of material fact exist as to whether the Plaintiff's complaint was a substantial or motivating factor in the Defendant' decision to terminate the Plaintiff and whether the Defendant would have terminated the Plaintiff even in the absence of the complaint. Therefore, we hold that a jury should determine whether the Plaintiff's complaint was a substantial or motivating factor in the Defendant's decision to terminate the Plaintiff, and if so, whether the Defendant would have terminated the Plaintiff even in the absence of the complaint.

The judgment of the trial court is reversed and the cause remanded for further proceedings in accordance with this opinion with costs of this appeal assessed against the appellee, Montgomery County, Tennessee.

_____
JERRY SCOTT, SENIOR JUDGE

[1] The record does not reveal what disciplinary action, if any, the Sheriff took against the Plaintiff for allegedly showing favoritism.